Nos. 82-34 & 82-226

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN PAPER INSTITUTE, INC.,
Petitioner,
v.
AMERICAN ELECTRIC POWER SERVICE CORPORATION, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF EDISON ELECTRIC INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ROBERT L. BAUM
Counsel of Record
Senior Vice President and
General Counsel
EDISON ELECTRIC INSTITUTE
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 828-7679

CARL D. HOBELMAN
EUGENE R. FIDELL
GEORGE M. KNAPP
SAMUEL BEHRENDS, IV
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Attorneys for
Edison Electric Institute

January 11, 1983

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MOTION OF EDISON ELECTRIC INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Rule 36.3, Edison Electric Institute ("EEI") moves for leave to file the attached *amicus curiae* brief in support of the Respondents. All parties other than Petitioner American Paper Institute and Respondent Elizabethtown Gas Company (whose brief supports the Petitioners) have consented to the filing of this brief, and their consents have been lodged with the Clerk. EEI regrets the necessity to submit this motion, *see On Lee v. United States*, 343 U.S. 924 (1952) (memorandum of Frankfurter, J.), but the strong interest of EEI's members in the disposition of this case and the presence of a number of *amicus curiae* briefs in support of the Petitioners (all of which were filed with consent pursuant to Rule 36.2) make it appropriate for EEI to submit its views.

EEI, which participated in the agency rulemaking, is the national association of investor-owned electric utilities. Its members are subject, directly or indirectly, to the rules of the Federal Energy Regulatory Commission ("the Commission") at issue in this case. Many EEI members are interconnected with cogenerators, and others are certain to interconnect in the future. Ratepayers of EEI member companies are or will be directly affected by the full avoided cost rule promulgated by the Commission.

The member utilities of EEI interact with cogenerators on a regular basis and have watched the cogeneration industry emerge over the past few years. The cogeneration industry has enjoyed continued growth since the lower court's decision. Because of the potential effects of this growth upon utility customers and upon the safety and reliability of the nation's power grid, EEI is submitting this brief in the hope it will be of assistance to the Court.

For the foregoing reasons, EEI respectfully moves for leave to file the attached brief as *amicus curiae* in support of the Respondents.

Respectfully submitted,

ROBERT L. BAUM
Counsel of Record
Senior Vice President and
General Counsel
EDISON ELECTRIC INSTITUTE
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 828-7679

CARL D. HOBELMAN
EUGENE R. FIDELL
GEORGE M. KNAPP
SAMUEL BEHRENDS, IV
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
Attorneys for
Edison Electric Institute

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BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Edison Electric Institute ("EEI") submits this brief as *amicus curiae* in support of Respondents. For the reasons stated below, the decision of the Court of Appeals for

the District of Columbia Circuit in *American Electric Power Service Corp. v. Federal Energy Regulatory Commission*, 675 F.2d 1226 (D.C. Cir. 1982), should be affirmed.

INTEREST OF EDISON ELECTRIC INSTITUTE

EEI is the national association of investor-owned utility companies in the United States. Its members serve 99 percent of all customers of the investor-owned segment of the industry and over 75 percent of the nation's electricity users. EEI submits this brief because the agency action on review disregards ratepayer interests recognized in the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117 (1978), and utility safety and reliability interests protected by the Federal Power Act, 16 U.S.C. § 824 *et seq.* (1976 & Supp. V 1981) ("FPA").

EEI participated in the Federal Energy Regulatory Commission ("the Commission") rulemaking that underlies this case. In light of the recognition in PURPA of the consumer interest in avoiding excessive electric rates, EEI argued for a rule providing a percentage-of-avoided-cost rate for cogeneration power,[1] so that there would be a sharing of the benefits of cogeneration between cogenerators and the ultimate customers to whom cogenerated energy is sold. The full avoided cost rule selected by the Commission deprives the ultimate customers of any participation in those benefits. EEI also pointed out to the Commission the dangers, from the standpoint of safety

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[1] For the sake of simplicity, the term "cogeneration" as used in this brief includes both cogeneration and small power production as defined in PURPA Section 201, 16 U.S.C. §§ 796(17)(A), 796(18)(A) (Supp. V 1981).

and reliability, that might arise if the Commission's interconnection authority were not exercised with due consideration of all the elements specified in the statute. The Commission chose, instead, to grant a blanket exemption from the statutory requirements.

Congress has spoken with regard to the role of cogeneration in the national energy policy, and the electric utility industry supports that program. A careful balancing of ratepayer, utility, and cogenerator interests explicitly recognized by Congress is essential if the congressional purposes are to be achieved. By confining its attention to cogenerator interests, the Commission failed to perform the functions contemplated by Congress.

SUMMARY OF ARGUMENT

Congress instructed the Commission to consider specific standards in promulgating interconnection and cogenerator rate rules. On both issues, the Commission issued a blanket order which effectively ignores the statutory standards. While approving other contested aspects of the cogeneration rules, the Court of Appeals remanded so that the agency might consider the two rules here at issue in light of those standards. The court neither dictated a particular result, substituted its judgment for that of the Commission, nor required the use of procedures beyond those called for by the statute.

1. *Interconnection.* Section 210(e)(3)(B) of PURPA, 16 U.S.C. § 824a-3(e)(3)(B) (Supp. V 1981), states that the Commission cannot exempt cogenerators from the procedural requirements for interconnection under the Federal Power Act. Section 202 of PURPA, which enacted FPA Section 210, 16 U.S.C. § 824i (Supp. V 1981), establishes the procedures to be followed when

a cogenerator seeks to compel a utility to interconnect. Contrary to this statutory framework, the Commission issued a blanket order requiring interconnection in every case and exempting cogenerators from the procedural requirements of the FPA.

Notwithstanding the deference ordinarily due an agency's statutory interpretation, no particular deference is owed the Commission's interpretation here since it lacks thoroughness and in any event conflicts with the language and legislative history of PURPA. The argument that PURPA Section 210(e)(3)(B) does not apply to a cogenerator unless the cogenerator is the *target* of the interconnection, rather than an *applicant* for interconnection, appears to have been fashioned from whole cloth and finds no support in the legislative history. The blanket interconnection rule offers no assurance that safety and reliability considerations will be taken into account.

2. *Full Avoided Cost.* Section 210(b) of PURPA, 16 U.S.C. § 824a-3(b) (Supp. V 1981), requires the Commission to insure that rates for cogenerated power be "just and reasonable to the electric consumers," and not in excess of 100% of the utility's incremental costs. The Commission's full avoided cost rule requires that states set rates at 100% of the utility's incremental costs in every case. The "just and reasonable" standard is disregarded.

The practical effect of the full avoided cost rule is to bestow all of the savings from cogeneration upon the cogeneration industry. The Commission failed to explain why the consumers for whose benefit the statute was in part passed should be denied rate benefits from this important new industry.

ARGUMENT

This is a relatively straightforward case about the duty of administrative agencies to apply the standards set by Congress. In the briefing thus far, the central issues have been obscured by a variety of devices.

First, and most surprisingly in the case of the Commission, Petitioners have invited this Court to look behind the opinion of a United States Court of Appeals in an effort to discern hostility to a major federal program and impeach the court's opinion by assertions that it may only be understood as a manifestation of some hidden, substantive judicial agenda. *See* p. 27 *infra;* FERC Br. at 16 & n.16, 17 & n.17; 21; API Br. at 15. Whatever the propriety of such efforts in the professional literature, *see, e.g.*, Breyer, Vermont Yankee *and the Courts' Role in the Nuclear Energy Controversy*, 91 Harv. L. Rev. 1833 & n.5 (1978), they have no proper place in the briefing process.

Second, much information concerning the presumed practical implications of alternative agency rules has been placed before this Court, even though the matters thus elaborated are classically of the type more properly addressed to the administrative agency than to a reviewing court. *E.g.*, NRDC Br. at 9-14; Diamond Shamrock Br. at 26-29; Kerr-McGee Br. at 15-19.

Third, the "parade of horribles," well known to this Court as a rhetorical device, has been carried to new lengths in this case. The consequences of the remand have been seriously overstated, *e.g.*, FERC Br. at 34; Kerr-McGee Br. at 6-7, and the ability of the Commission to reconcile the public interest in fostering cogeneration with the statutory requirement for notice and an opportunity for hearing before ordering an interconnection has been significantly underestimated. FERC Br. at 46; API Br. at 38-41.

None of this should be permitted to divert attention from the real—and rather narrow—issues in the case: did the Commission err (1) in concluding that the interconnection safety and reliability provisions of the FPA were subject to blanket exemption for cogenerators, and (2) in failing to articulate why it chose a cogeneration rate that was the absolute highest permitted under the statute? When the text of the statutes is considered, as well as the legislative history, it becomes clear that remand to the agency is not only consistent with the limited function of the reviewing court but necessary to vindicate the congressional intent.

I. THE COMMISSION'S BLANKET EXEMPTION OF QUALIFYING FACILITIES FROM THE INTERCONNECTION HEARING REQUIREMENTS OF THE FPA IGNORES THE MEANING AND PURPOSE OF THAT STATUTE AS WELL AS PURPA

A. Neither PURPA Nor the FPA Contemplates Blanket Exemptions from Interconnection Requirements

Cogeneration energy sources may be linked to conventional electrical transmission systems through physical interconnection with utility company equipment. Interconnection may be voluntary or involuntary. If the utility and the cogenerator are unable to negotiate an agreement to interconnect, the Commission may compel interconnection under the FPA. The Commission's mandatory interconnection rule, 18 C.F.R. § 292.303(c) (1982), however, goes further and shields cogenerators from the procedural and substantive requirements of the FPA which apply when voluntary interconnection is not achieved.

1. *The statutory framework.* Several sections of PURPA and the FPA come into play. FPA Section 210 (a) (1) (A), which was enacted by PURPA, provides the remedy for a cogenerator who seeks to interconnect over the objection of a utility:

> Upon application of any electric utility, Federal power marketing agency, geothermal power producer (including a producer which is not an electric utility), qualifying cogenerator, or qualifying small power producer, the Commission may issue an order requiring—
>
> (A) the physical connection of any cogeneration facility, any small power production facility, or the transmission facilities of any electric utility, with the facilities of such applicant[.] 16 U.S.C. § 824i (a)(1)(A) (Supp. V 1981).

The Commission may issue such an order only if it makes certain findings regarding efficiency, safety, and reliability. FPA Section 210(c) states:

> No order may be issued by the Commission under subsection (a) of this section unless the Commission determines that such order—
>
> (1) is in the public interest,
>
> (2) would—
>
> (A) encourage overall conservation of energy or capital,
>
> (B) optimize the efficiency of use of facilities and resources, or
>
> (C) improve the reliability of any electric utility system or Federal power marketing agency to which the order applies, and
>
> (3) meets the requirements of section 824k of this title [FPA Section 212]. 16 U.S.C. § 824i(c) (Supp. V 1981).

FPA Section 212(a), in turn, provides:

> No order may be issued by the Commission under section 824i of this title [FPA Section 210] . . . unless the Commission determines that such order—
>
> (1) is not likely to result in a reasonably ascertainable uncompensated economic loss for

any electric utility, qualifying cogenerator, or qualifying small power producer, as the case may be, affected by the order;

(2) will not place an undue burden on an electric utility, qualifying cogenerator, or qualifying small power producer, as the case may be, affected by the order;

(3) will not unreasonably impair the reliability of any electric utility affected by the order; and

(4) will not impair the ability of any electric utility affected by the order to render adequate service to its customers. 16 U.S.C. § 824k(a) (Supp. V 1981).

PURPA Section 210, 16 U.S.C. § 824a-3 (Supp. V 1981), does not exempt cogenerators from the procedural and substantive requirements of FPA Sections 210 and 212. Indeed, Section 210(e)(3)(B) contains the following non-exemption clause, which ensures that the safety and reliability concerns of utilities and their customers will be addressed when cogenerators seek interconnection:

> No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from—
>
> (B) the provisions of section 210, 211, or 212 of the Federal Power Act . . . or the necessary authorities for enforcement of any such provision under the Federal Power Act[.] 16 U.S.C. § 824a-3(e)(3)(B) (Supp. V 1981).

No other provision of PURPA or the FPA authorizes the Commission to grant exemptions from the FPA's interconnection requirements.

2. *The Commission's shifting analysis.* Notwithstanding its responsibility to implement these provisions as enacted, the Commission ignored the statutory scheme and announced a mandatory interconnection requirement.

The primary basis for the rule, as stated in the Notice of Proposed Rulemaking, was the belief that the "requirement to interconnect is . . . particularly subsumed within the requirement to buy and sell" under PURPA Section 210(a). 16 U.S.C. § 824a-3(a) (Supp. V 1981). Jt. App. at 47. In the final rule, the Commission turned to general language in FPA Section 212(e)(1), which provides that FPA Section 210 shall not be treated "as requiring any person to utilize the authority of such section 824i [FPA Section 210] . . . in lieu of any other authority of law," 16 U.S.C. § 824k(e)(1) (Supp. V 1981), to advance the theory that Congress must have meant that PURPA Section 210 was another "authority of law" covering interconnection by qualifying facilities. Pet. App. at B-60.

Petitions for agency rehearing pointed out that this interpretation rendered PURPA Section 210(e)(3)(B) superfluous. The Commission responded with the novel distinction that the non-exemption clause of PURPA Section 210(e)(3)(B) applies to those cases where the cogenerator is the "target" of an interconnection order. Pet. App. at B-180. It announced that the clause did not apply to cogenerators as "applicants" because there can only be an exemption from duties, liabilities, or requirements, and the ability to apply is "a grant of standing." *Id.* at B-182.

3. *Construction of the statute.* The issue before this Court has been framed as a matter of affording deference to agency interpretation. API Br. at 35-36. The Commission's interpretation here, however, cannot be accepted because it conflicts with the plain meaning and purpose of PURPA.

> Although an agency's interpretation of the statute under which it operates is entitled to some deference, 'this deference is constrained by our obligation to

> honor the clear meaning of a statute, as revealed by its language, purpose, and history.'

Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979), *quoting Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979). This is just such a case. The Commission's interpretation, with its dismissal of the safety and reliability protections afforded under FPA Sections 210 and 212, "runs counter to the broad goals which Congress intended [the statute] to effectuate." *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968). In addition, the Commission's reading fails to display the degree of thoroughness which is a prerequisite for judicial deference. *E.g., St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 783 n.13 (1981), *citing Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Looking to the plain meaning, FPA Section 210 is the only provision applicable to cases in which voluntary interconnection has not been achieved. It contains not the slightest hint that the interconnection application process may be dispensed with or varied when the applicant happens to be a cogenerator.

Because the statute is clear on its face, there is no occasion to explore the legislative history. Nonetheless, as shown in Respondents' brief, the legislative history of PURPA compels the conclusion that Congress intended cogenerators to apply for a Commission order when seeking to compel interconnection, and deemed the FPA to be the sole authority governing interconnection for purposes of sales to utilities. We would only add that the legislative history stressed by the Commission does not support the Agency's argument that the obligation to interconnect is "subsumed within the obligation to purchase." FERC Br. at 44. Proposed Section 546(a)(2) of the House bill, which did not survive the conference, required the promulgation of rules regarding interconnection with the "distribution system" of utilities and would have applied

only to the type of interconnection under which a customer takes electricity from the *distribution* facilities of the utility. H.R. 8444, § 546(a)(2), 95th Cong., 1st Sess. (1977). It did not cover the type of interconnection at issue here: interconnection with the transmission facilities to permit the cogenerator to transmit electricity to be sold to the utility. Moreover, the fact that Congress removed Section 546(a)(2)—the only provision of that PURPA Section 210 predecessor section that applied to any kind of interconnection—refutes the claim that Congress intended to subsume the ability to compel interconnection within the obligation to purchase from cogenerators.

Actions taken to delete language prior to final passage provide strong indication of the intent of Congress, *e.g.*, *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980), and actions of conferees are to be given great weight for they establish that the final product "was the result, not of inadvertence, but of deliberate action." *United States v. Pfitsch*, 256 U.S. 547, 551 (1921). The congressional handling of proposed Section 546(a)(2) provides significant added support for the view that the drafters did not intend to exempt cogenerators from the framework for interconnection that was already in place in the FPA amendments.

It remains to address briefly two other ancillary arguments that have been advanced in support of the Commission's interpretation. One rests on the portion of FPA Section 212(e) that states that "[n]o provision of Section 824i of this title [FPA Section 210] shall be treated . . . as requiring any person to utilize the authority of such Section 824i of this title [FPA Section 210] . . . in lieu of any other authority of law." 16 U.S.C. § 824k(e) (Supp. V 1981). That provision was intended to preserve other bases for interconnection under the FPA such as

FPA Section 202(b). 16 U.S.C. § 824(b)(2) (1976 & Supp. V 1981).[2] It has nothing to do with relief for cogenerators from the interconnection requirements.

Finally, several of the briefs before the Court seek to validate the Commission's interconnection rule by arguing that the non-exemption clause of PURPA Section 210(e)(3)(B) applies to cogenerators only when they are "targets" of interconnection, not when they are "applicants." API Br. at 32; Kerr-McGee Br. at 26-27; Diamond Shamrock Br. at 10. The Court of Appeals noted that it had been pointed to "no evidence in the legislative history or the statute itself to justify this interpretation," Pet. App. at B-24 to -25, and the cited briefs do nothing to remedy this because there is no support for a "target"/"applicant" distinction.

4. *Policy arguments.* Petitioners are left with various policy arguments as to why cogeneration interconnection should be exempt from the general requirements for interconnection. Such arguments are, of course, more properly addressed to Congress, and cannot replace the plain language of the statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-45 (1979). Indeed, these arguments have been addressed to Congress quite recently. Under H.R. 6500, introduced during the 97th Congress, "[c]umbersome sections 210 and 212 of the Federal Power Act would no longer apply to the interconnection of qualifying facilities with utilities." *Cogeneration and Small Power Production: Hearings on H.R. 6500 Before the Subcomm. on Energy Conservation and Power of the*

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[2] "Subsection (e) of new section 212 expresses the intention of the conferees that the authorities granted in sections 210 and 211 are in addition to and not in lieu of other authority the Commission may have under the Federal Power Act." H. Rep. No. 95-1750, 95th Cong., 2d Sess. 94 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7828 ("Conf. Rep.").

House Comm. on Energy and Commerce, 97th Cong., 2d Sess. 2 (1982) (statement of Rep. Ottinger). Neither H.R. 6500 nor its counterpart, S. 1885, was passed.[3]

B. The Commission Ignored Reliability and Safety Issues Which Are the Reasons For Interconnection Hearings

Safety and reliability are issues of fundamental importance to utilities. The ability to provide adequate and reliable service to customers may be affected by interconnection with new entities such as cogenerators. For example, "[t]here are cases in which for technical reasons an interconnection involving the backfeed of power into the utility system must not be made at all."[4] Congress provided a procedure for issuance of orders when utilities and cogenerators disagree on these matters. Interconnection may be compelled only upon a finding under FPA Section 212(a) that it will not result in an undue burden on the utility system, an unreasonable impairment of system reliability, or an impairment of the ability to render service. 16 U.S.C. § 824k(a) (Supp. V 1981). By exempting cogenerators from the procedural and substantive requirements, the Commission has frustrated the congressional policy of protecting the utility from adverse safety or reliability consequences of interconnection.

The Commission's mandatory interconnection rule denies utilities and their customers the protection of safety and reliability standards expressly recognized in FPA Sections 210 and 212. Those standards are critical to utility efforts to provide safe, reliable service. As one utility representative observed, "[t]he substantive safeguards established in PURPA are of vital importance.

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[3] The bill would also have created a presumption in favor of full avoided cost rates for cogeneration energy. *See* pp. 19-30 *infra*.

[4] Cogeneration and Small Power Production: Hearings on H.R. 6500, *supra*, at 117 (statement of Bertram Schwartz, Consolidated Edison Co. of New York, Inc.).

Failure to adhere to them could lessen the reliability of an electric utility's system, increase the possibility of instabilities, make voltage control ineffective and endanger human safety." [5]

The Commission's rule emphatically does not provide the same safety and reliability safeguards afforded utilities by the statute, as one Petitioner claims. API Br. at 33-35. It does not incorporate the specific considerations set forth in FPA Section 212(a), let alone require the cogenerator to establish conformity with those considerations. The argument that it would be pointless to make the additional findings required under FPA Section 210 overlooks the additional findings required with respect to the burden on the system, impairment of reliability, and ability to render service.[6]

Petitioners point to state commissions as protectors of utility safety and reliability interests as cogenerators seek to interconnect with utilities. API Br. at 34 n.33. Yet, Congress had a federal interest in mind when it enacted FPA Sections 210 and 212, and therefore placed the responsibility to protect safety and reliability concerns directly with the Commission when interconnection proceedings are initiated under the FPA. The mandatory interconnection rule does not require the states to make findings on safety and reliability similar to those required by FPA Section 212. To the extent the Commission's PURPA rules *allow* states to speak to safety and reliability (*e.g.*, "[a]ny State regulatory authority . . . *may* establish reasonable standards to ensure system safety and reliability of interconnected operations" 18

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[5] *Id.*, at 197 (statement of Glenn J. Bjorklund, Southern California Edison Co.).

[6] The fact that these findings may not be difficult to make establishes nothing more than that interconnection proceedings for cogenerators will be narrowly focused, and therefore likely prospects for streamlining in the hands of the agency. *See* pp. 15-16 *infra*.

C.F.R. § 292.308 (1982) (emphasis added)), fewer than half have chosen to address these concerns. Of the 45 states which have promulgated implementing rules or standards, only 20 discuss minimum safety and reliability requirements. Few states address these matters in sufficient detail to assure that interconnections will not harm utility system safety and reliability.

C. Interconnection with Cogenerators Can be Fostered by Less Drastic Means Than a Blanket Exemption

The Court of Appeals properly observed that means less sweeping than a blanket exemption—such as streamlined procedures—exist to facilitate interconnection with cogenerators while ensuring due consideration of safety and reliability issues. Pet. App. at B-23. Petitioners' rejection of this analysis is based on the assumption that the Commission will be incapable of adopting such procedures. This assumption merely reflects the fact that the Commission has yet to try, as it has done successfully in other contexts,[7] to adopt the kinds of procedures and guidelines that ensure expedited action.[8]

Drawing on its expertise in the interconnection field, and its experience over decades of adjudicatory proceedings, it would be astounding if the Commission could not find ways to narrow the issues and provide guidelines as

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[7] FPC v. Texaco, Inc., 417 U.S. 380 (1974); Permian Basin Area Rate Cases, 390 U.S. 747 (1968). More recent illustrations of the Commission's ability to provide guidelines on recurring evidentiary matters include the Commission's rules regarding the inclusion of construction work in progress in rate base, 18 C.F.R. § 2.16 (1982), and the determination of "price squeeze" issues. 18 C.F.R. § 2.17 (1982).

[8] The assumption also appears to be present that the utilities possess unlimited litigative resources far out of proportion to those of would-be cogenerators. This disregards the impact of federal and state commission oversight of utility expenditures as well as the fact that many of the cogenerators are themselves industrial behemoths in no danger of being overwhelmed by any adversary in agency proceedings.

to recurring evidentiary questions. The Commission unquestionably has authority to particularize the FPA Section 210 and Section 212 standards through the rulemaking process. *See FPC v. Texaco, Inc.*, 417 U.S. 380 (1974). Expedition would also be served by familiar administrative techniques such as "fast-track" scheduling, waiving initial decisions, identifying lead cases and giving them a calendar preference, restricting discovery, and consolidating proceedings. These rather conventional procedures would not be too burdensome, API Br. at 40, and would not be contrary to evidentiary hearing and substantial evidence requirements. FERC Br. at 46 n.47. If expedited procedures prove unsatisfactory, the parties could, as the Court of Appeals stated, Pet. App. at B-23, seek amendment of the statute. The Commission may not, however, take the law into its own hands and excuse cogenerators from compliance with the statute.

The fear that agency procedures will themselves frustrate the development of cogeneration is equally misplaced. There is no reason to assume, as at least some of the cogenerators do, that *every* cogenerator will have to seek an interconnection order, and that the FPA requirements will create an "obstacle course." Kerr-McGee Br. at 6. An overwhelming crush of cases is hardly likely. In many cases, interconnection will be achieved through voluntary agreement. Where agreement cannot be achieved because of disagreement over safety and reliability issues, the Commission has the authority to dispense with a hearing when no material facts are in dispute.[9] Protracted agency proceedings thus would be unlikely.

Other objections to requiring interconnection proceedings on a case-by-case basis are equally unconvincing.

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[9] Kerr-McGee's claim that adjudicatory hearings will be required in every case is misleading. Kerr-McGee Br. at 28-30. A hearing in proceedings under the FPA need be held only when there is a factual dispute on a material issue. *E.g.*, Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125 (D.C. Cir. 1969).

API, for example, draws the Court's attention to the Commission's proposed fee for a contested interconnection proceeding—some $57,000. API Br. at 39 n.41. EEI agrees with the cogenerators that this is excessive; like the cogenerators, the electric utility industry filed comments opposing this proposal.[10] Even if the proposed rule is accepted by the Commission over the objections of this united front, applicants whose projects cannot bear the expense may obtain a waiver. 47 Fed. Reg. 39,851, 39,860 (1982) (to be codified at 18 C.F.R. § 381.106). Similar claims have been made that adjudicatory hearings before the Commission are "prohibitively expensive," costing approximately $1,500 per hearing day. Kerr-McGee Br. at 29. The support for this claim, however, is a study of *curtailment* proceedings,[11] which involve more numerous parties and more controversial issues than would an interconnection proceeding.

At bottom, Petitioners' objections amount to variations on the theme that the electric utility industry will fight interconnection applications at every turn. Such fears have no part in the proper disposition of this case and only poison the atmosphere in which utilities have been working and will continue to work constructively with cogenerators to assist in energy facility development. It flies in the face of experience and regulatory policy to assume that the remand to the agency "would give utilities a powerful tool with which they could hinder, delay and ultimately extract onerous terms from project developers . . . ." API Br. at 40.[12] Far from being in the

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[10] Comments of EEI, FERC Dkt. No. RM82-38-000 (Nov. 1, 1982).

[11] Pierce, *The Choice Between Adjudication and Rulemaking for Formulating and Implementing Energy Policy*, 31 Hastings L.J. 1 (1979).

[12] The lack of foundation for API's contention is apparent from the paucity of evidence it cites. Even those materials it does iden-

business of fighting project developers, utilities seek reliable sources of supply, including cogeneration, at least cost, to help meet customer needs.[13] There is no lack of evidence of utility efforts going far beyond voluntary interconnection agreements. Some, for example, have assisted cogenerators by assuming cogenerator project risks or guaranteeing their debt.[14]

In short, claims of delay, regulatory paralysis, the potential demise of cogeneration, and the risk of abuse of procedures require acceptance on faith that the Commission will stand idly by while utilities overwhelm cogenerators in a regulatory war of attrition. Utilities have yet to see evidence of a laissez-faire Commission approach to proceedings under its jurisdiction, and the assumption that the Commission is a helpless, pitiful giant incapable of regulating its own proceedings does an injustice to the agency and gives litle credit to those on whose expertise Petitioners place such great weight.

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tify turn out not to support the point. Thus, in Central Power & Light Co., FERC Dkt. No. EL79-8, cited by API at p. 39, n.42, the underlying dispute antedated PURPA, and involved efforts by Texas utilities to resist requests by Oklahoma utilities for interconnection. It is not a cogeneration case; it is an extension of an inter-utility dispute into the new procedural forum authorized by FPA Section 210. It offers no guidance as to how cogenerator applications will proceed.

[13] FERC As A Least-Cost Regulator: Hearings Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce, 97th Cong., 2d Sess. 217-18 (1982) (testimony of Jerry L. Maulden, Arkansas Power and Light Co.).

[14] *E.g.*, Pacific Gas and Electric Company, 46 PUR 4th 257 (Cal. Pub. Utils. Comm'n 1982) (utility agreement to levelized payments above avoided costs to facilitate financing); Pacific Gas and Electric Company, Order No. 61117 (Cal. Pub. Utils. Comm'n July 7, 1982) (utility guarantee of facility bonds).

II. THE COMMISSION FAILED TO EXAMINE WHETHER FULL AVOIDED COST RATES ARE JUST AND REASONABLE TO ELECTRIC CONSUMERS

A. The Statute Requires That Rates Be Just And Reasonable To Electric Consumers, But The Commission Failed To Examine That Issue

Section 210 of PURPA requires utilities to purchase power from cogenerators and small power producers. 16 U.S.C. § 824a-3 (Supp. V 1981). The costs of this power are then included in the utility's own cost of service and, in this fashion, ultimately borne by its customers. Section 210(b) requires the Commission to "insure" that rates for these purchases shall be "just and reasonable to the electric consumer," and that those rates shall never exceed 100% of the utility's avoided cost.[15] By adding Section 210(b), Congress expressed its concern for "protecting the interests of the electric consumer in receiving electric energy at equitable rates." Conf. Rep. *supra*, at 97, 1978 U.S. Code Cong. & Ad. News at 7831. However, Congress also felt that the ratemaking procedure for cogenerators "should not be burdened by the same examination as are utility rate applications, but rather in less burdensome manner." *Id.* at 98, 1978 U.S. Code Cong. & Ad. News at 7832.

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[15] Section 210(b) provides:

> (b) The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—
>
> (1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and
>
> (2) shall not discriminate against qualifying cogenerators or qualifying small power producers
>
> No such rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy. 16 U.S.C. § 824a-3(b) (Supp. V 1981).

In short, Congress looked to the Commission to insure that rates for cogenerated energy are "just and reasonable to electric consumers," without resort to the painstaking analysis of costs of service that typifies conventional utility ratemaking proceedings.

The Commission responded to this assignment by the simple device of dismissing the savings to the ratepayer as "insignificant," Pet. App. at B-65, and commanding the states to set rates for cogenerated energy across-the-board at 100% of the utility's avoided cost. Full avoided cost is the highest level allowed by the statute. Aside from a rote incantation of the statute at the beginning of the Order, *id.* at B-62, the phrase "just and reasonable" was never mentioned, and the substance of the concept never discussed.

B. The Commission Failed to Explain Why Full Avoided Cost Rates are Just and Reasonable to Electric Consumers

When a utility purchases cogenerated power at less than its full avoided cost, the resultant savings ultimately benefit the customers of that utility. Before PURPA was passed, it was thought that these consumer savings would be significant.[16] By the Commission's own admission, however, "the full avoided cost standard will not produce any rate savings to the utility's customers." FERC Br. at 20, *quoting* Pet. App. at B-65. Instead of examining the "just and reasonable" issue, the Commission's Order lists three reasons why all savings should go to the cogeneration industry rather than to consumers. These assumptions in no way show that the resulting rule is "just and reasonable to electric consumers."

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[16] For example, Senator Hart of Colorado, *citing* a Dow Chemical Company study in support of an earlier cogeneration bill, promised that "cogeneration can save household consumers as much as $3.6 billion every year in reduced utility bills." 123 Cong. Rec. S16,397 (daily ed. Oct. 5, 1977).

1. *Impact on individual ratepayers.* The Commission first noted that if less than full avoided costs were allowed, "any rate reductions will be insignificant for any individual customer." Pet. App. at B-65. Estimates of the actual impact upon consumers vary. Senator Hart's statement, note 16 *supra*, indicates that potential savings may be quite large in the aggregate, while one *amicus* states that the savings would be "at most 4 percent of the *incremental* cost of generation." Kerr-McGee Br. at 21-22 n.26. Even the latter figure can be quite significant, particularly for large industrial consumers. The Commission's Order leaves the reader with no idea how much money is involved, Pet. App. at B-65, nor does it attempt to gauge the actual impact upon consumers.

A similar error occurred in *FPC v. Texaco, Inc.* There, the Commission's predecessor agency had the duty to determine whether natural gas rates were "just and reasonable" under the Natural Gas Act of 1938, 15 U.S.C. § 717 *et seq.* (1976 & Supp. V 1981). The FPC decided to exempt small producer rates from direct regulation by a blanket order. There, as here, the argument was advanced that the effect of these rates upon the ultimate consumers was insignificant. Noting that the Commission admitted that small producer rates could have a significant effect "in some situations," this Court concluded:

> Even if the effect of increased small-producer prices would make a small dent in the consumer's pocket, when compared with the rates charged by the large producers, the Act makes unlawful all rates which are not just and reasonable, and does not say a little unlawfulness is permitted. 417 U.S. at 399.

The lesson of *Texaco* is clear: when charged with establishing just and reasonable rates, the Commission cannot simply dismiss that issue on the grounds that these

rates will make "a small dent in the consumer's pocket." [17] The Commission therefore erred in believing in this case that it could dismiss ratepayer impacts that were small considered on an individual basis.

2. *Range of available procedural options.* The Commission's second assumption was that a "split-the-savings" approach, which would permit consumers to enjoy at least some rate benefit from cogeneration, would be too burdensome because "it would require a determination of the costs of production of the qualifying facility." Pet. App. at B-65. The Commission evidently assumed that it had only two choices: either dismiss the "just and reasonable" issue out of hand (as it did), or conduct a full-scale evidentiary hearing into the costs of every cogenerator. No such dilemma existed, however, since a wide middle ground lies between these two extremes. The Commission failed to explore that middle ground.

The Commission has been faced with a similar task before. In *Permian*, the FPC issued an order establishing maximum rates for sales of natural gas. In holding that the FPC need not inquire into every producer's cost of service, this Court explained what was required in a "just and reasonable" determination:

> This Court has repeatedly recognized that legislatures and administrative agencies may calculate rates for a regulated class without first evaluating the separate financial position of each member of the class; it has been thought to be sufficient if the

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[17] Indeed, Commission jurisdiction over electric rates was created in part because state law was inadequate to protect the interests of individual consumers "who would have, *in the aggregate*, an interest in the interstate rate." Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co., 273 U.S. 83, 90 (1927) (emphasis added). Because of the aggregate effect of the small interests of millions of consumers, state regulation constituted a direct burden on interstate commerce and federal regulation was required. *Id.* Thus, the duty to protect the aggregate interests of consumers goes to the heart of the Commission's regulatory function.

> agency has before it representative evidence, ample in quantity to measure with appropriate precision the financial and other requirements of the pertinent parties. 390 U.S. at 769 (citations omitted).

Here, however, the Commission made no attempt to gauge "financial requirements" of the parties, as required under *Permian*. It could have done so in a variety of ways without necessarily holding a full hearing into the costs of each cogenerator. For example, it could have (1) set rates at a fixed percentage of avoided costs, and allowed each cogenerator or class of cogenerators to prove that it requires a higher rate in order to proceed with an economically viable project that will serve the public interest; (2) considered cogenerator costs by class, according to type of energy source or facility size; or (3) established an avoided cost range, and allowed state commissions to set rates within that range. At the very least, the Commission could have (4) examined the cost of representative existing cogenerators, and made its determination on the basis of this evidence, with appropriate safety valves, *see* 390 U.S. at 770-71, for cases not fairly subsumed within the representative class.

Because the Commission chose to ignore these and other alternatives, it failed to conduct the examination contemplated by *Permian*, and its action therefore falls far short of the requirements for a "just and reasonable" determination.

3. *Encouragement of cogeneration.* The Commission's final hypothesis was that full avoided costs "may provide significant incentive" for some cogenerators. Pet. App. at B-65. The goal of encouraging cogeneration is found in Section 210(a) of PURPA, but the "just and reasonable" requirement is also a command of the statute. The Commission's apparent position is that, if there is a chance that a full avoided cost rule might be needed to encourage the last kilowatt of some hypothetical cogenerator, other requirements of the Act can be ignored. The "just and

reasonable" standard was part and parcel of Congress' plan, and may not be subordinated to any other part.

The Commission's hypothesis is also wrong because a full avoided cost rule is not necessary to encourage cogeneration. For example, one *amicus* supporting Petitioners quotes a utility official as stating that his company has signed more than 60 cogenerator contracts, and that "nearly all" of these have been for less-than-full avoided cost. NRDC Br. at 10 n.10, *citing Public Utility Regulatory Policies Act Amendments: Hearings on S.1885 Before the Subcomm. on Energy Regulation of the Senate Comm. on Energy and Natural Resources*, Pt. 2, 97th Cong., 2d Sess. 110, 114, 131 (1982) (statement of Glenn J. Bjorklund, Southern California Edison Co.). This experience suggests that cogenerators do not need full avoided cost rates in order to make a profit. It is also revealing that in the period since the Court of Appeals remanded the Commission's full avoided cost rule, the number of applications for qualifying facility status has *doubled*.[18] The assumption, therefore, that a full avoided cost rule is needed to encourage cogeneration does not reflect business realities.

4. *Post hoc rationalizations.* Thus far we have addressed those arguments advanced by the Commission in support of its full avoided cost rule at the time it was promulgated. Since then, a variety of new arguments have been unveiled in an effort to buttress this aspect of the Order. As *post hoc* rationalizations of appellate counsel, these cannot be accepted. *E.g., SEC v. Chenery Corp.*, 332 U.S. 194, 195 (1947). In any event, the arguments are incorrect on the merits.

The Commission now attempts to justify its full avoided cost rule by citing that portion of PURPA Sec-

[18] In the 11 months following issuance of the decision, potential cogenerators filed 241 applications for qualifying facility status and notices of facility self-certification. For the 11 months prior to the decision, only 105 applications and notices were filed.

tion 210(b) which states that rates shall be set so as not to "exceed incremental cost" of the electric utility. FERC Br. at 19. Relying on *Permian*, it characterizes its task as the establishment of a "zone of reasonableness" of which 100% of avoided cost is the upper limit. This reading misinterprets the statute and misapplies *Permian*. Congress explained that the rate should not exceed "the *lower* of the rate described above, namely a rate which is just and reasonable to consumers of the utility, in the public interest, and nondiscriminatory, *or* the incremental cost of alternate electric energy." Conf. Rep. *supra*, at 98, 1978 U.S. Code Cong. & Ad. News 7832 (emphases added). In other words, depending on the outcome of the "just and reasonable" determination, the "zone of reasonableness" might or might not include a rate which provided for 100% of avoided cost. The Commission's statutory error lies in its mistaken view that a 100% of avoided cost rate was *ipso facto* within the "zone of reasonableness," rather than a limit to be applied after the "just and reasonable" determination had been made.

As for *Permian*, it is clear that the Commission could set a rate at the high end of the "zone of reasonableness," but wherever it sets the rate, it must first have conducted an investigation of "representative evidence, ample in quantity to measure with appropriate precision the financial and other requirements of the pertinent parties." 390 U.S. at 769. Even given the PURPA conferees' concern that the examination not be as elaborate as that seen in the usual utility rate case, *see* p. 19 *supra*, the "zone of reasonableness" concept nonetheless requires *some* examination of the facts. This the Commission failed to do.

The American Paper Institute maintains that a full avoided cost rule is needed in order to give cogenerators leverage at the bargaining table and to induce the utility to bargain. API Br. at 26-29. In the utility industry's experience, state commissions are quite capable of applying these inducements, *see, e.g.*, Herron, *The Rush is on*

to Find New Gold in Falling Water, 13 Smithsonian 87, 90 (Dec. 1982) (California Pub. Utils. Comm'n assistance to small hydro company in negotiations), and do so regularly in other contexts, such as the review of utility resource plans or rates of return. Chairman Butler, who came to the Commission after these rules were promulgated, recently addressed this point. In a colloquy with Representative Moorhead of California, Chairman Butler stated:

> So the argument goes that in order to obtain a contract term adequate to support the financing, cogeneration must bargain with the utilities for something less than 100 percent of the avoided cost. Now, it has been represented that that is the case. The reason that I feel reluctant to either agree or not to agree is that . . . I simply have never seen any empirical evidence or even very much in the way of anecdotal evidence that supports the proposition.

Cogeneration and Small Power Production: Hearings on H.R. 6500, supra, at 17-18 (testimony of FERC Chairman Charles M. Butler III). Without evidence to support the argument of increased bargaining position, the "bargaining power" justification must fail.

API also claims that the long-term benefits to consumers are so great that no short-term rate benefits need to be granted to the consumer. API Br. at 23. Congress knew of long-term benefits such as "avoid[ing] the use of expensive electric energy generated by fossil fired units." Conf. Rep. *supra*, at 99, 1978 U.S. Code Cong. & Ad. News at 7833. Nonetheless, it required that rates be "just and reasonable," in addition to the long-term benefits expected to flow generically from cogeneration. API's argument impermissibly treats the "just and reasonable" clause as surplusage. *E.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955); 2A Sutherland, *Statutory Construction* § 46.06 (C. Sands 4th ed. 1973).

C. The Court of Appeals Responded Correctly to the Commission's Failure to Comply with the Statute

In this Court, the Commission has accused the Court of Appeals of "manifest hostility," "antagonism," "apparent distaste for the rule," and "substituting its judgment for that of the Commission." FERC Br. at 16-17, 21; *see also* API Br. at 15. Such contentions merit short shrift for two reasons. First, we believe it is entirely out of keeping with this Court's jurisprudence—including *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978)—to undertake, as the Commission has sought to do, FERC Br. at 17 n.17, to look behind the text on an appellate opinion in an effort to discern the court's motivation. Second, an examination of the Court of Appeals' decision (which sustained other challenged provisions of the Commission's cogeneration rules, *see* FERC Br. at 6 n.13; Pet. App. at B-34) demonstrates that, far from substituting its judgment for that of the agency, the court merely insisted that the agency "provide the public with the reasoned consideration, decisionmaking, and opinion which it is required to give," Pet. App. at B-12 (footnote omitted), rather than arbitrarily selecting a result that purports to encourage cogeneration without regard to cost or ratepayer benefit. The Commission has misread the court's opinion and displayed false modesty as to its ability to fulfill its responsibilities on remand. No corrective action by this Court is needed.

The Court of Appeals remanded on the full avoided cost issue, asking the Commission to explain what it did. Pet. App. at B-34. The court did not recommend a result to the Commission, and stated that "[t]he Commission may be right in its conclusion, but it needs to make its reasoning and findings explicit." *Id.* at B-11. The court took pains to point out that "[a] general rule is acceptable." *id.* at B-16, and added that the remand "would not necessarily require any inquiry into cogenerators costs." *Id.* at B-11. The court held only that "the Commission

must explain why the level was set here rather than somewhere else." *Id.* at B-16. In short, it dictated neither a result nor procedures.

This is hardly the work of a court bent on substituting its judgment for that of the agency.

The Commission states that "the court below appears to have relied on the rule of *Public Systems v. FERC*, 606 F.2d 973 (D.C. Cir. 1979), a case in which the court had applied a 'substantial evidence' test on review[.]" FERC Br. at 29. A close reading of both this case and *Public Systems* indicates that the "substantial evidence" test was not applied below. Rather, the Court of Appeals followed only the "reasoned decisionmaking" requirement of *Public Systems*. Pet. App. at B-12. As *Public Systems* itself observed, the "reasoned decisionmaking" standard is "similar to the standard enunciated recently . . . for 'arbitrary and capricious' review of informal rulemaking. . . ." 606 F.2d at 980 n.34. The mere citation of *Public Systems*, therefore, scarcely shows that the substantial evidence test was applied. More to the point, a review of the opinion below makes clear that the Court of Appeals was concerned with the inadequacy of the Commission's legal analysis and disregard of statutory requirements rather than with the inferences to be drawn from the record or the completeness of the record, although the latter are more typically associated with substantial evidence review.

The Administrative Procedure Act requires that agency action not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1976). This standard of review does not allow an agency to ignore a statutory command, nor does it permit "judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *NLRB v. Brown*, 380 U.S. 278, 292 (1965), *quoting American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965). Even under the "arbitrary and capricious" standard, an agency's

decision still must be "rational and based on consideration of the relevant factors." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978). A statutory command is surely such a factor, since "a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). By disregarding Congress' explicit concern for electric consumer interests, the Commission doomed its action to invalidation under the arbitrary and capricious standard.

Finally, the filed briefs complain that the remand to the Commission will damage the cogeneration industry. One warns that the decision will frustrate the cogeneration program. Elizabethtown Gas Br. at 4. The Commission complains about "the several years' delay that would result from initiation of a new rulemaking" as a burden to the industry. FERC Br. at 34.[19] An industry group states that the Court of Appeals' action will "generally threaten the continued growth of electric power generation" through alternative means. Kerr-McGee Br. at 6-7. The lower court placed no burden on these parties other than to require that the Commission at least ask whether they are receiving a windfall at ratepayer expense. Despite the general economic decline, the co-

[19] There is no reason to believe that a prolonged period would be required to complete the proceedings on remand. Had the agency taken the necessary steps when the case was decided below, the new rules—assuming any changes were necessary—would probably be in place today. The Commission implies that the statutory deadline under which the rules were promulgated justifies unusual deference to its action. FERC Br. at 31 n.34. As it happens, the Commission missed the deadline. *Cf.* United States Steel Corp. v. EPA, 595 F.2d 207, 213 (5th Cir.) (agency could not have considered "sacrosanct" a deadline it missed), *rehearing granted in part on other grounds*, 598 F.2d 915 (5th Cir. 1979). In any event, the existence of such deadlines does not allow an agency to dispense with procedural requirements, *id.*, and *a fortiori* should not allow an agency to neglect a substantive requirement of law such as that which seeks to ensure rates that are "just and reasonable to electric consumers."

generation industry has prospered since the Court of Appeals' decision. Given the lack of adverse impact the Court of Appeals' action has had on cogeneration, and the Commission's failure to date to afford any recognition to the statutory goal of protecting consumer interests, the Court of Appeals' action has not "noticeably interfere[d] with," and will actually promote, the ends of PURPA. *Cf. New Jersey v. EPA*, 626 F.2d 1038, 1048 (D.C. Cir. 1980).

Any "just and reasonable" determination involves "a balancing of the . . . interests." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). Given its dismissal of ratepayer interests, the Commission has yet to conduct the balancing process required under PURPA. Insisting that it do so is a quintessential judicial responsibility in our system of law.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT L. BAUM
Counsel of Record
Senior Vice President and
General Counsel
EDISON ELECTRIC INSTITUTE
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 828-7679

CARL D. HOBELMAN
EUGENE R. FIDELL
GEORGE M. KNAPP
SAMUEL BEHRENDS, IV
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Attorneys for
Edison Electric Institute

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